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No. — 375

In the Supreme Court of the United States

OCTOBER TERM, 1958

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	12
Appendix A	13
Appendix B	17
Appendix C	19
Appendix D	20

CITATIONS

Cases:

Cornell Steamboat Co. v. *United States*, 321 U. S. 634 — 8, 9

Kansas City Southern Ry. v. *United States*, 231 U. S. 423 — 5, 7, 8

Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294 — 11

Scripps-Howard Radio v. *Federal Communications Commission*, 316 U. S. 4 — 11

Statute:

Air Mail Act of June 12, 1934, as amended, 49 Stat. 618, section 10 — 9

Civil Aeronautics Act, as amended, 49 U. S. C. 401, et seq.:

Section 205 (a) — 20

Section 407 — 2

Section 407 (a) — 20

Section 407 (b) — 20

Section 407 (c) — 21

Section 407 (d) — 2, 4, 7, 8, 9, 11, 21

Miscellaneous:

1955 Annual Report of the Civil Aeronautics Board — 6

Comptroller General's October 1955 Audit Report to the Congress of the United States, Civil Aeronautics Board — 6, 10

479432—58——1

Miscellaneous—Continued

3 F. R. 2474
19 F. R. 4200
20 F. R. 7111
21 F. R. 4444
21 F. R. 4444-4446
H. Rep. 2635, 75th Cong., 3d Sess., p. 73
H. Rep. 2360, 85th Cong., 2d Sess., pp. 10–11
H. Rep. 2556, 85th Cong., 2d Sess., p. 90
Scharfman, *The Interstate Commerce Commission*, Vol. III–A, p. 69
Sen. Rep. 1811, 85th Cong., 2d Sess., p. 22
Uniform System of Accounts prescribed by the Post Office Department for Domestic Air Mail Carriers, effective July 1, 1937:
Section 38 (c)–(e), (h), and (i)
Section 39

In the Supreme Court of the United States

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No. ——

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Civil Aeronautics Board, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the District of Columbia Circuit on June 20, 1958, in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 13–16) and the opinion of the United States District Court for the District of Columbia (Appendix C, *infra*, p. 19) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, pp. 17–18) was entered on June 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Civil Aeronautics Act of 1938 authorizes the Civil Aeronautics Board to prescribe the depreciation practices, and in particular the classes of property which may be depreciated, of air carriers subject to the Board's jurisdiction.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938 are set forth in Appendix D, *infra*, pp. 20–21.

STATEMENT

Section 407 (d) of the Civil Aeronautics Act (*infra*, p. 21) empowers the Civil Aeronautics Board to "prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers." The section further declares that it shall be unlawful for air carriers to keep any accounts, records, or memoranda "other than those prescribed or approved by the Board", subject to the proviso that an air carrier may keep additional accounts "if they do not impair the integrity of the accounts" prescribed or approved by the Board.[1] Pursuant to these provisions, the Board

[1] Section 407 was reenacted without change in the recent Federal Aviation Act of 1958. The primary purpose of this legislation was to achieve greater safety in air traffic. As a matter of simplicity in draftsmanship, the Civil Aeronautics Act was reenacted, rather than amended; obsolete provisions and terminology, however, were eliminated. Congress did not intend "to either adopt or reject administrative interpretations or practices, or judicial decisions under the present law," and reenactment of existing provisions was to be considered "as an absolute neutral factor in any question of interpretation which may arise in the future." H. Rep. 2360, 85th Cong., 2d Sess.

since passage of the Act in 1938 has prescribed a Uniform System of Accounts for air carriers, and in the varying revisions has specified general categories, but not precise subclassifications, of depreciable and nondepreciable property.

The present case involves certain accounting requirements which the Board adopted on April 30, 1956, to become effective January 1, 1957, following a notice of proposed rule-making to revise comprehensively the Board's existing accounting and reporting requirements (R. 34).[2] This notice was published in the Federal Register and circulated to the industry in July 1954, and in September 1955 a further notice of proposed rule-making containing modifications of the previously proposed regulations was published in the Federal Register and circulated to the industry (*ibid.*).

Although the revised accounting regulations provided that on a proper showing the Board might waive any of its provisions for any carrier or group of carriers,[3] a majority of the certificated air carriers,

pp. 10–11. See, to the same effect, Sen. Rep. 1811, 85th Cong., 2d Sess., p. 22; H. Rep. 2556, 85th Cong., 2d Sess., p. 90.

[2] We use the designation "R." to refer to the joint appendix filed in the court below.

[3] Section 241.1-2 of the Board's Economic Regulations provides (21 F. R. 4444):

"A waiver from any provision of this system of accounts or reports may be made by the Civil Aeronautics Board upon its own initiative or upon the submission of written request therefor from any air carrier, or group of air carriers, provided that such a waiver is in the public interest and each request for waiver expressly demonstrates that: existing peculiarities or unusual circumstances warrant a departure from a procedure or technique prescribed herein; a specifically de-

prior to the effective date of the new regulations challenged the validity of certain requirements through the medium of a declaratory judgment proceeding against the Board and its members (R. 1-6). The requirements thus challenged were that spare parts for aircraft be classified as either "expendables" (parts used only once) or "rotables" (parts repaired and reused), with depreciation permissible only on the latter, and that a maintenance reserve, to be treated as a valuation reserve, be established for major overhauls of airframes. The complaint averred that the challenged regulations prescribe the "classes of property" which may be depreciated, and "prescribe and affect the rate at which" aircraft may be depreciated, and that Congress has "deliberately withheld" such authority from the Board (R. 4–5).[4]

The District Court granted summary judgment for the Board. As grounds for its decision, the District Court held: (1) that the provisions of Section 407 (d) are "practically in *pari materia*" with those of the Interstate Commerce Act which this Court, in

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fined alternative procedure or technique will result in a substantially equivalent or more accurate portrayal of operating results or financial condition, consistent with the principles embodied in the provisions of this system of accounts and reports; and the application of such alternative procedure will maintain or improve uniformity in substantive results as between air carriers."

[4] Subsequently the Board promulgated regulations prescribing specific rates of depreciation for certain types of aircraft. The industry has challenged these regulations (*American Airlines* v. *C. A. B.*, D. C. D. C., No. 3123–57; *Trans-World Airlines* v. *C. A. B.*, D. C. D. C., No. 3136–57), and ultimate disposition of these cases is likely to governed by the final action in the present proceeding.

Kansas City Southern Ry. v. *United States*, 231 U. S. 423, had construed as conferring power to prescribe the substance as well as the form of accounts; and (2) that the Board's power to regulate depreciation is "inherent and implicit" both in the language of the statute and its overall purposes (*infra*, p. 19).[5] The Court of Appeals reversed, primarily upon the ground that, since "Congress has *expressly* authorized one regulatory agency after another to control depreciation practices," the absence of a like express grant in the Civil Aeronautics Act indicates Congress' purpose to deny such authority to the Board, notwithstanding the *Kansas City Southern* decision (*infra*, pp. 14–15).

REASONS FOR GRANTING THE WRIT

1. This case presents a question of large importance in the administration of the Civil Aeronautics Act. Resolution of the question by this Court is in the interest of both the Board and the industry affected.

In carrying out its regulatory duties,[6] the Board has found it necessary that air carriers keep their accounts under a uniform system which will provide

[5] The District Court also denied American Airlines' motion to amend and supplement the complaint to allege arbitrary action by the Board as to American in relation to the challenged requirements (R. 29–33). Consequently, American took a separate appeal from the judgment of the District Court, but the Court of Appeals, in view of its disposition of the case, did not reach the question of whether the District Court had erred in denying American's motion.

[6] These duties include fixing of carrier rates, determining the subsidy needs of individual carriers, and passing upon applications for new route authority, removal of discriminations, and proposed consolidations and mergers.

readily available and reliable information respecting the income and assets of individual carriers and groups of carriers. The Board has emphasized that the air carriers' accounts, records, and statistical reports "are among the principal sources of information available for use in the economic regulation of the civil air transport industry." *1955 Annual Report of the Civil Aeronautics Board,* p. 9. The Comptroller General has likewise stressed the importance of control by the Board of carrier depreciation practices. *Comptroller General's October 1955 Audit Report to the Congress of the United States, Civil Aeronautics Board,* pp. 78–80.[7] As to effective administration of a somewhat similar regulatory statute, it has been authoritatively stated: "Without complete control of accounting practices * * *, the extensive system of regulation which now prevails would be virtually impossible." Scharfman, *The Interstate Commerce Commission,* Vol. III–A, p. 69.

In the instant case, there is nothing in the opinion of the court below to suggest that it interpreted the statute as withholding from the Civil Aeronautics Board *all* power to prescribe substantive accounting requirements—an interpretation which would invalidate practically all of the Uniform System of Accounts prescribed by the Board (see 21 F. R. 4111

[7] The report states (*ibid.*) that absence of such control results in "variances in depreciation rates and residual values" among carriers utilizing similar types of aircraft, occasional overpayment of subsidy by the United States, and publication by the Board of overall air industry statistics which do not reflect adjustment in book figures on depreciation made by the Board for rate-making purposes.

4466). But the court did construe the authority conferred by Section 407 (d) as not including accounts dealing with depreciation, notwithstanding the explicitness of the language defining the section's coverage, namely, "*any* and *all* accounts to be kept by carriers" (emphasis added). The decision, by reading into the statute an implied exception as to depreciation, leaves individual air carriers free to determine what property they will depreciate and the rate of depreciation. Such uncontrolled discretion renders carrier accounts virtually meaningless from the standpoint of disclosing true net operating income and capital assets.

The need for exercise of more extensive control over depreciation has become more acute now that trunkline carriers have largely attained economic self-sufficiency. The Board no longer has the same checkrein over depreciation practices that it had when most of the carriers were receiving subsidy and their depreciation practices were under the Board's constant scrutiny in subsidy rate proceedings.

2. *Kansas City Southern Ry. v. United States*, 231 U. S. 423, held that the authority given the Interstate Commerce Commission by Section 20 of the Interstate Commerce Act to "prescribe the forms of accounts, records, and memoranda to be kept by the carriers" empowered the Commission to regulate both the substance and form of railroad accounts. The Court said (p. 440):

> We do not, however, think that any such distinction between the form and the substance is admissible * * *. The very object of a sys-

> tem of accounts is to display the pertinent financial operations of the company, and throw light upon its present condition. If they are to truly do this, the form must correspond with the substance.

And the Court, in sustaining the validity of one of the accounting requirements under attack, observed that the railroad's contention "in effect ignores depreciation—an inevitable fact which no system of accounts can properly ignore." 231 U. S. at 448.

The Civil Aeronautics Act, which in large measure was modeled on the Interstate Commerce Act, similarly authorizes the Board to "prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers * * *." This provision in Section 407 (d), as the District Court noted (*infra*, p. 19), is "practically in *pari materia*" with the Interstate Commerce Act provision involved in *Kansas City Southern*. Thus, when Congress enacted the Civil Aeronautics Act, it not only used language which is broad enough to include the authority to regulate depreciation practices, but it also used the precise language which this Court had interpreted as having that effect. In these circumstances, it must be presumed that the two statutes were to be construed alike. *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634, 640–641.

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* The court below referred to Senator Truman's objections to a provision of the Senate bill specifically dealing with regulation of depreciation and to the elimination of this provision by the conferees, and said that legislative history "tends to confirm" the court's interpretation of 407 (d). *Infra*, pp. 15–16. But the Senate provision thus eliminated imposed upon the

Not only does Section 407 (d) contain the precise language which was construed by this Court to confer authority to regulate depreciation accounting practices of carriers, but the Board, moreover, has continuously exercised such authority almost from the date of enactment of the Civil Aeronautics Act in 1938.[9] The court below appears to have concluded

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Board the specific mandate to prescribe, "as soon as practicable", classes of depreciable property and applicable depreciation rates. Neither Senator Truman's objection to this specific mandate nor its elimination in conference shows any purpose to withhold from the Board regulatory authority as to depreciation accounting. See H. Rept. 2635, 75th Cong., 3d Sess., p. 73. The legislative history relied upon for a restrictive reading of 407 (d) parallels, but is even less persuasive than, the legislative history which in *Cornell Steamboat* was found not to warrant a restrictive reading of the statute there involved. See 321 U. S. 634, fn. 8, at 641-642, dissenting opinion at 646.

[9] The Board's predecessor, the Civil Aeronautics Authority, promulgated on October 12, 1938, as one of its first official acts, Regulation 407-D-1, 3 F. R. 2474. This regulation, issued under Section 407 (d) of the Act, required every air carrier engaged in regularly scheduled interstate transportation to keep its accounts in accordance with the Uniform System of Accounts previously prescribed for air mail carriers by the Post Office Department. The Uniform System of Accounts which air carriers were thus required to observe defined the types of property to be classified as "subject to depreciation" and the types to be classified as "not subject to depreciation"; specified the manner of determining the property base and rate of depreciation in computing the depreciation to be credited to "accrued depreciation" accounts; specified that charges for depreciation shall not exceed the difference between the ledger value of property and its residual value; and provided that, with the approval of the Post Office Department, air carriers may create reserves "to provide for major overhauls of aircraft." Section 38 (c)-(e), (h)-(i) and Section 39 of Uniform System of Accounts prescribed by the Post Office Department for Domestic Air Mail Carriers effective July 1, 1937 (issued under authority of Section 10 of the Air Mail Act of June 12, 1934, as amended, 49 Stat. 618).

that this long-standing and consistent administrative construction was to be disregarded because the Comptroller General, in a letter submitted to a Senate Subcommittee in April 1955, stated that the Board has not prescribed detailed regulations governing depreciation "because it is of the view that authority to do so is not specifically contained in the Civil Aeronautics Act" (*infra*, p. 16).[10] But only the Board or a duly delegated spokesman can authoritatively declare its interpretation of the statute. Moreover, both before and shortly after the Comptroller General's statement, the Board had officially asserted possession of statutory authority to control air carriers' depreciation practices.[11]

As previously stated (*supra*, p. 5), the provisions incorporated in certain other federal regulatory statutes which expressly authorize control of depreciation accounting were viewed by the court below as indica-

[10] While the Comptroller General recommended amending the act to grant the Board "specific statutory authority" to control depreciation accounting, his consistent view, as expressed earlier to Congress, was that the statute already conferred on the Board authority to exercise such control, but that grant of specific authority was desirable to "clarify the situation". *Comptroller General's October 1955 Audit Report to the Congress of the United States, Civil Aeronautics Board*, p. 80.

[11] In July 1954 the Board issued a notice of proposed rule-making which embraced additional requirements as to depreciation (19 F. R. 4200), and in September 1955 it issued a further notice of proposed rule-making involving prescription of precisely the depreciation accounting requirements which are here in issue (20 F. R. 7111). See also R. 34, 39–50.

tive of Congressional intent to withhold grant of such authority to the Civil Aeronautics Board. This Court, however, has been hesitant to attach significance to the omission from a statutory provision of explicit language incorporated in another section of the statute or in a related statute. Cf. *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 11. In the statutes in which regulation of depreciation accounting was expressly authorized, the purpose appears to have been either to eliminate all ambiguity respecting power to exercise this control or to impose on the regulatory agency a mandate to exercise such control forthwith.

There is no pattern of legislation sufficiently clear, we believe, to overcome the presumption that Congress, when it wrote into Section 407 (d) the very language which this Court in *Kansas City Southern* had construed as conferring authority to impose substantive accounting requirements (including accounting for depreciation), intended the section to have the same scope and meaning. And any doubt concerning this would seem to be removed by the regulatory agency's long-standing and consistent construction of the statute, which is not to be overturned "except for very cogent reasons." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 1958.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 14192

ALASKA AIRLINES, INC., ET AL., APPELLANTS

v.

CIVIL AERONAUTICS BOARD, ET AL., APPELLEES

No. 14193

AMERICAN AIRLINES, INC., APPELLANT

v.

CIVIL AERONAUTICS BOARD, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 20, 1958

Before EDGERTON, *Chief Judge*, and BAZELON and FAHY, *Circuit Judges*

EDGERTON, *Chief Judge*: The Civil Aeronautics Board's revised "Uniform System of Accounts and Reports for Air Carriers" determines the kinds of equipment for which depreciation may be taken, requires reserves for major overhauls of airframes, and requires cost of overhauls to be included in the value of aircraft. 21 Fed. Reg. 1835. Appellant air carriers filed in the District Court a complaint challenging these regulations on the ground that the Board has no authority to regulate depreciation charges, except by adjusting or disallowing them in rate-making.

Section 407 (d) of the Civil Aeronautics Act, 52 Stat. 1000, 49 U. S. C. § 487 (d), requires the Board to "prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers, including the accounts, records, and memoranda of the movement of traffic, as well as the receipts and expenditures of money, and the length of time such accounts, records, and memoranda shall be preserved; and it shall be unlawful for air carriers to keep any accounts, records, or memoranda other than those prescribed or approved" by the Board.

The District Court rendered summary judgment for the Board. The court cited *Kansas City So. Ry. v. United States*, 231 U. S. 423 (1913), which held that similar statutory authority over the form of accounts and records carried with it some control over their substance. We think it does not follow from that decision, rendered over 44 years ago, that the Civil Aeronautics Board now has the authority it claims. The question is what intention should now be attributed to Congress. Congress has *expressly* authorized one regulatory agency after another to control depreciation practices. It has done so in the Federal Power Act,[1] the Natural Gas Act,[2] and the Interstate Commerce Act, Part II, dealing with motor carriers. The 1940 amendment of the Motor Carrier Act provides: "The Commission may prescribe for motor carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property * * *" In the Inter-

[1] 49 Stat. 855, 16 U. S. C. § 825a (a).

[2] 52 Stat. 826, 15 U. S. C. § 717h (a).

[3] 54 Stat. 927, 49 U. S. C. § 320 (c). The original 1935 Act covering motor carriers, 49 Stat. 563, contained a general books-and-records clause but no specific depreciation authority

state Commerce Act, Parts I and III, dealing with railroads and water carriers,[4] and the Federal Communications Act,[5] Congress expressly *required* the agency to prescribe depreciation practices. We conclude that when Congress wishes to confer such authority, it says so.

The legislative history of the Civil Aeronautics Act tends to confirm the view that Congress has not conferred this authority on the Board. When the Senate was considering Senate Bill No. 3845 and also a substitute offered by Senator Truman, he said. "The bill [S. R. 3845] contains a section (sec. 408 (b), p. 64, line 6) which expressly empowers the authority to prescribe rates of depreciation for the property of air carriers. The substitute contains no express provision on this subject, but the authority in fixing the rates for a particular air carrier could inquire into the rates of depreciation charged off by the carrier, and if it found them too high, could disallow the expense. The substitute certainly is preferable in this case because the imposition of this requirement upon the authority will only increase the administrative burden of the authority and will not increase the effectiveness of its regulation. While it is possible to forecast the rate at which a railroad car will depreciate, it is utterly impossible to do so in the case of aircraft, for aircraft are developing so rapidly that they are obsolete and cannot be used in competition long before they are worn out." 83 Cong. Rec. 6727–28. The bill as it passed the Senate contained express

[4] 41 Stat. 493, 49 U. S. C. § 20 (4); 54 Stat. 945, 49 U. S. C. § 913 (d).

[5] "The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses * * *" 48 Stat. 1078, 47 U. S. C. § 220 (b).

authority over rates of depreciation, but the House bill (H. R. 9738) and the law as finally enacted did not mention depreciation. Moreover, only two days before it passed the Civil Aeronautics Act, Congress included in the Natural Gas Act not only a section dealing with accounts but also a section authorizing the Power Commission to regulate depreciation charges.

The Board contends it has long exercised control over depreciation practices. It cites a regulation adopted in 1938, 3 Fed. Reg. 2474, requiring air carriers to keep their accounts in accordance with systems prescribed by the Post Office Department which the Board says require these carriers to classify property as "subject to depreciation" or "not subject to depreciation". But in recommending to Congress, in 1955, that the Civil Aeronautics Act be amended to give the Board control over depreciation, the Comptroller General said: "* * * the Board has not prescribed any overall depreciation policies, rates of depreciation or residual values for air carriers' flight equipment or other property primarily because it is of the view that authority to do so is not specifically contained in the Civil Aeronautics Act."[6]

Whether the Board should have the control over depreciation that Congress has given to other agencies is a problem for Congress, not the courts. See *Border Pipeline Co. v. Federal Power Commission*, 84 U. S. App. D. C. 142, 171 F. 2d. 149.

Reversed.

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[6] Hearings of Subcommittee of the Senate Committee on Interstate and Foreign Commerce on Amendments to the Civil Aeronautics Act, 84th Cong., 1st Sess., pp. 179–180 (1955).

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

April Term, 1958

C. A. 3638-56

No. 14192

ALASKA AIRLINES, INC., ET AL., APPELLANTS

v.

CIVIL AERONAUTICS BOARD, ET AL., APPELLEES

April Term, 1958

C. A. 3638-56

No. 14193

AMERICAN AIRLINES, INC., APPELLANT

v.

CIVIL AERONAUTICS BOARD, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, *Chief Judge*, and BAZELON and FAHY, *Circuit Judges*

Judgment

United States Court of Appeals for the District of Columbia Circuit. Filed June 20, 1958. Joseph, W. Stewart, Clerk.

These cases came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in these cases be, and it is hereby, reversed, and that these cases be, and they are hereby, remanded to the District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: June 20, 1958.

Per Chief Judge EDGERTON.

APPENDIX C

United States District Court for the District of Columbia

Civil No. 3638–56

ALASKA AIRLINES, INC., ET AL., PLAINTIFFS

v.

CIVIL AERONAUTICS BOARD, ET AL., DEFENDANTS

Memorandum

Filed June 25, 1957. Harry M. Hull, Clerk.

The defendants' motion for summary judgment is granted. See *Kansas City So. Ry.* v. *United States*, 231 U. S. 423 (1913). In that case the Court was concerned with the interpretation of the I. C. C. Act of June 29, 1906, 34 Stat. 584, known as the Hepburn Act. This Act, as far as substance is concerned, is practically in *pari materia* with that with which we are concerned. True, the Act as finally passed contained no provision dealing with the problem of depreciation; nonetheless it can not be concluded in the circumstances that by virtue of that fact the power is not inherent and implicit in the very language of the Act itself and the over-all purposes for which it was designed. The Court concludes that it is.

The motion of American Airlines to amend and supplement the complaint is denied for two reasons. First of all, the complaint is a consolidated one to which American Airlines seeks to add by virtue of *its* alleged subsequent relation with the Board, and two, it is premature.

Order accordingly.

(S) Matthew F. McGuire,
MATTHEW F. McGUIRE,
United States District Judge.

JUNE 25, 1957.

APPENDIX D

The relevant provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401, *et seq.*, are:

SEC. 205. (a) The Authority [Board] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of the Act [chapter], as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act [chapter]. [49 U. S. C. 425 (a)]

* * * * *

SEC. 407. (a) The authority [Board] is empowered to require annual, monthly, periodical, and special reports from any air carrier; to prescribe the manner and form in which such reports shall be made; and to require from any air carrier specific answers to all questions upon which the Authority [Board] may deem information to be necessary. Such reports shall be under oath whenever the Authority [Board] so requires. The Authority [Board] may also require any air carrier to file with it a true copy of each or any contract, agreement, understanding, or arrangement, between such air carrier and any other carrier or person, in relation to any traffic affected by the provisions of this Act [chapter]. [49 U. S. C. 487 (a)]

(b) Each air carrier shall submit annually, and at such other times as the Authority [Board] shall require, a list showing the names of each of its stockholders or members holding more than 5 per centum

of the entire capital stock or capital, as the case may be, of such air carrier, together with the name of any person for whose account, if other than the holder, such stock is held; and a report setting forth a description of the shares of stock, or other interests, held by such air carrier, or for its account, in persons other than itself. [49 U. S. C. 487 (b)]

(c) Each officer and director of an air carrier shall annually and at such other times as the Authority [Board] shall require transmit to the Authority [Board] a report describing the shares of stock or other interests held by him in any air carrier, any person engaged in any phase of aeronautics, or any common carrier, and in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, air carriers, other persons engaged in any phase of aeronautics, or common carriers. [49 U. S. C. 487 (c)]

(d) The Authority [Board] shall prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of money, and the length of time such accounts, records, and memoranda shall be preserved; and it shall be unlawful for air carriers to keep any accounts, records, or memoranda other than those prescribed or approved by the Authority [Board]: *Provided,* That any air carrier may keep additional accounts, records, or memoranda if they do not impair the integrity of the accounts, records, or memoranda prescribed or approved by the Authority [Board] and do not constitute an undue financial burden on such air carrier. [49 U. S. C. 487 (d)]

U. S. GOVERNMENT PRINTING OFFICE: 1938

BRIEF IN OPPOSITION

FILE COPY

OCT 17 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 375

CIVIL AERONAUTICS BOARD, *Petitioner*

v.

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., *et al.*

BRIEF IN OPPOSITION

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October 1958

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Denying the Writ	4
Conclusion	13

CITATIONS

Cases:

County of Marin v. *United States*, 356 U.S. 412	11
Kansas City Southern Railway v. *United States*, 231 U.S. 423	3, 6, 9
United States v. *Missouri Pacific R. Co.*, 278 U.S. 269	11

Statutes:

Civil Aeronautics Act, as amended, 49 U.S.C. 401, et seq.:	
Section 205(a)	12
Section 407(d)	2, 3, 4, 6, 7, 9, 12, 13
Federal Communications Act:	
48 Stat. 1078, 47 U.S.C. § 220(b)	8, 10
Federal Power Act:	
49 Stat. 855, 16 U.S.C. § 825a(a)	7, 10
Interstate Commerce Act:	
41 Stat. 493, 49 U.S.C. § 20(4), 54 Stat. 945, 49 U.S.C. § 913(d)	7
Motor Carrier Act:	
54 Stat. 927, 49 U.S.C. § 320(c)	7, 10
Natural Gas Act:	
52 Stat. 826, 15 U.S.C. § 717b(a)	7, 8, 10
Water Carrier Act:	
54 Stat. 945, 49 U.S.C. § 913(d)	10

Miscellaneous:

14 C.F.R. 241	2
Comptroller General's Audit Report to the Congress of the United States, Civil Aeronautics Board, October 1955, p. 80	12
83 Cong. Rec. 6727-8 (1938)	9, 10
Hearings of Subcommittee of the Senate Committee on Interstate and Foreign Commerce on Amendment to the Civil Aeronautics Act, 84th Cong., 1st Sess., pp. 179-180 (1955)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 375

CIVIL AERONAUTICS BOARD, *Petitioner*

v.

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. 13-16)[1] is reported at 257 F. 2d 229. The opinion of the United States District Court for the District of Columbia (Appendix C, p. 19) is not reported.

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[1] Appendix and page references are to the Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, pp. 17-18) was entered on June 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 407(d) of the Civil Aeronautics Act of 1938 authorizes the Civil Aeronautics Board to prescribe the depreciation practices to be followed by air carriers in keeping their accounts and in making reports.

STATEMENT

Pursuant to the requirement contained in Section 407(d) of the Civil Aeronautics Act of 1938 that the Civil Aeronautics Board "prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers," the Board has for many years prescribed a Uniform System of Accounts and Reports for Air Carriers. On April 30, 1956, the Board adopted Regulation No. ER-210 which revised the Uniform System of Accounts effective January 1, 1957. (14 C.F.R. 241) As a part of that revision, the Board for the first time asserted it had power under Section 407 (d) of the Act to determine the depreciation practices to be followed by air carriers and adopted regulations prescribing such practices. These regulations provide (1) that only those aircraft parts and assemblies may be depreciated which are capable of being repaired and reused; (2) that the cost of major overhauls of airframes be depreciated through a charge to a maintenance reserve and not be taken as a current expense; and (3) that both the residual value of airframes and cost of an overhaul be eliminated in determining the remaining values subject to depreciation.

Respondents challenged these regulations in the United States District Court for the District of Columbia on the ground that Section 407(d) of the Civil Aeronautics Act did not empower the Board to prescribe depreciation practices. It was and is respondents' position that the authority of the Board over depreciation practices was deliberately limited by Congress to the adjustment or disallowance of an air carrier's depreciation charges in ratemaking or other appropriate proceedings under the Civil Aeronautics Act. The District Court granted summary judgment for the Board on the authority of *Kansas City Southern Railway* v. *United States*, 231 U.S. 423, which involved the authority of the Interstate Commerce Commission under the Hepburn Act of 1906.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed in a unanimous decision, Chief Judge Edgerton speaking for himself and Judges Bazelon and Fahy. The Court of Appeals found the reliance placed by the District Court on the *Kansas City Southern* case to be unwarranted because the gloss which that decision placed upon a section of the Hepburn Act was of no help in determining the intention to be attributed to Congress in enacting the Civil Aeronautics Act of 1938. The court noted that in all other regulatory statutes in which Congress had authorized an administrative agency to prescribe depreciation practices it had done so with express and specific language. Moreover, in all other statutes specific authority with respect to depreciation practices had been considered necessary notwithstanding the same grant of authority to prescribe accounts and records on which the Board relies for its asserted power over depreciation practices. In addition, the court found that while the bill which became the Civil Aeronautics

Act was under consideration, a specific provision empowering the Board to regulate depreciation practices had been deleted before the statute was enacted. The Court of Appeals accordingly held that the authority of the Board to prescribe "accounts, records, and memoranda" under Section 407(d) does not include the power to determine and prescribe depreciation practices of air carriers and that the Congress has withheld such authority from the Board.

REASONS FOR DENYING THE WRIT

1. The question presented is of limited importance in the administration of the Civil Aeronautics Act and of no importance in the administration of any other act.

Petitioner has undertaken by implication and overstatement to broaden the narrow issue involved. First and foremost, the decision below does not in any way affect the authority of the Board, exercised in commercial rate-making and subsidy determination proceedings under the Civil Aeronautics Act, to adjust or disallow depreciation charges found to be unreasonable. The Board's power in these significant respects is not questioned. For these purposes, therefore, the decision below does not leave "individual air carriers free to determine what property they will depreciate and the rate of depreciation" (p. 7). It leaves the Board in complete possession of the same "checkrein over depreciation practices" it has exercised in the past (p. 7). As the Court of Appeals below explicitly recognized (App., p. 13), and as the parties have until now agreed, the question here involved is much narrower.

It concerns only the power asserted by the Board to prescribe the depreciation practices to be used by air

carriers for official record-keeping purposes. The questioned regulations are naturally of concern to the respondents; they would impose depreciation practices which the carriers and their independent public accountants regard as unsound, and they would require that financial data be reported to shareholders and lending institutions in accordance with such practices. However, the disputed authority is by no means essential to the Board's undisputed power to modify or disallow depreciation charges in the exercise of any of its important statutory duties described in the petition (p. 5, n. 6). Convincing proof of the Board's complete ability to perform its statutory duties without this asserted power is seen in the fact that it has carried on for almost twenty years without it.

Nor does the decision below question the Board's clear authority to require from the air carriers regular, complete, and detailed information as to their depreciation practices. It does not authorize withholding from the Board an iota of information bearing on a carrier's depreciation practices; it does not deny the Board the right to demand all manner of depreciation data by way of regular or special reporting requirements. Thus, the decision does not render carrier accounts "virtually meaningless" or deprive the Board of any information necessary to a determination of "true net operating income and capital assets" (p. 7). The assertions in the petition to the contrary are simply inaccurate.

The single and narrow issue presented is whether Congress has given the Board the authority to prescribe in advance which assets may be depreciated and which factors, such as maintenance and overhaul reserves, must enter into depreciation charges. The

court below held only that this specific authority was withheld from the Board by Congress. The studied attempts in the petition to broaden the scope of the controversy are thus highly misleading.

2. Not only is the question presented of limited importance to the effective execution of the Board's statutory duties, but the decision of the Court of Appeals is clearly correct. If the Board believes it needs the authority it has asserted, its recourse is to the Congress, which denied it that authority.

The decision below rests on a careful examination of the legislative history of the Civil Aeronautics Act itself and the language used by Congress in establishing the other federal regulatory agencies. Rather than face this examination, petitioner continues to construct its argument on the decision of this Court in the *Kansas City Southern* case. By reading this decision to mean that language used by Congress in 1906 authorized the Interstate Commerce Commission to regulate railroad depreciation practices, petitioner argues that Congress in 1938 had its 1906 language and this Court's 1913 decision in mind, and must have intended to grant authority over depreciation practices when it enacted Section 407(d) of the Civil Aeronautics Act in similar language. But this argument proves too much: if the events of 1906 and 1913 were remembered by Congress when it enacted the Civil Aeronautics Act, why were they forgotten on so many other occasions when Congress used explicit language to grant other federal regulatory agencies authority to prescribe depreciation practices?

The Court of Appeals placed the *Kansas City Southern* case in its proper context by examining the many

regulatory statutes that have been enacted by Congress since that decision, declaring pointedly (App., p. 14):

> "We think it does not follow from that decision, rendered over 44 years ago, that the Civil Aeronautics Board now has the authority it claims. The question is what intention should now be attributed to Congress."

The court went on to set forth the reasoning which compels the holding that the "accounts, records, and memoranda" language of Section 407(d) does not grant the Board power over depreciation practices (App., p. 14-15):

> "Congress has *expressly* authorized one regulatory agency after another to control depreciation practices. It has done so in the Federal Power Act,[2] the Natural Gas Act,[3] and the Interstate Commerce Act, Part II, dealing with motor carriers. The 1940 amendment of the Motor Carrier Act provides: 'The Commission may prescribe for motor carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property . . .'[4] In the Interstate Commerce Act, Parts I and III, dealing with railroads and water carriers,[5] and the

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[2] 49 Stat. 855, 16 U.S.C. § 825a(a).

[3] 52 Stat. 826, 15 U.S.C. § 717h(a).

[4] 54 Stat. 927, 49 U.S.C. § 320(c). The original 1935 Act covering motor carriers, 49 Stat. 563, contained a general books-and-records clause but no specific depreciation authority.

[5] 41 Stat. 493, 49 U.S.C. § 20(4); 54 Stat. 945, 49 U.S.C. § 913(d).

> Federal Communications Act,[6] Congress expressly *required* the agency to prescribe depreciation practices. We conclude that when Congress wishes to confer such authority, it says so." [Footnotes and emphasis are those of the court.]

The fact is, therefore, that year after year, and in statute after statute, when Congress has wished to empower an administrative agency to regulate depreciation, it has said so in explicit fashion. In each instance, moreover, Congress has expressly dealt with authority over depreciation practices even though each statute also granted authority to prescribe "accounts and records". Thus, as the court below noted, only two days before the approval of the Civil Aeronautics Act, the Natural Gas Act was approved in which Congress had included not only a provision granting the Power Commission authority to prescribe accounts and records but also a section specifically empowering the Commission to regulate depreciation charges.[7] It must be concluded, therefore, that Congress itself does not view the language relied upon by the Board as granting any authority over depreciation practices. Otherwise, it would have been useless for it to have granted specifically the express authority to regulate depreciation practices in other statutes.

Petitioner's only answer to this revealing course of congressional enactments is to urge that the "legislative pattern" is not "sufficiently clear" to "overcome the presumption" that Congress in 1938 intended the

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[6] "The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses . . ." 48 Stat. 1078, 47 U.S.C. § 220(b).

[7] Natural Gas Act, 52 Stat. 826, 15 U.S.C. § 717h (a).

language of Section 407(d) to mean what this Court in 1913 had said similar language meant in the *Kansas City Southern* case. A rational basis for such a presumption is nowhere advanced. Nor is it made clear why the intention of Congress in 1938 should be derived from what this Court said in 1913, rather than from what Congress itself said in later years.

Moreover, the "presumption" which petitioner has created runs afoul of the legislative history of the Civil Aeronautics Act itself. Many of the bills concerning the regulation of air carriers introduced in both houses contained a provision similar to that customarily used by Congress to give an agency power to regulate depreciation practices. H.R. 9738, which was finally passed by the House, did not contain such a provision, while the final Senate bill, S. 3845, did. In conference this provision of the Senate bill was deleted. In the Senate, then Senator Truman who had opposed including the questioned provision in the first place, explained the provision and his objections to its inclusion. The deleted provision according to Senator Truman

> "expressly empowered the authority to prescribe rates of depreciation for the property of air carriers. The substitute contains no express provisions on this subject, but the authority in fixing the rates for a particular air carrier could inquire into the rates of depreciation charged off by the carrier, and if it found them too high, could disallow the expense. The substitute certainly is preferable in this case because the imposition of this requirement upon the authority will only increase the administrative burden of the authority and will not increase the effectiveness of its regulation. While it is possible to forecast the rate at which a railroad car will depreciate, it is

> utterly impossible to do so in the case of aircraft, for aircraft are developing so rapidly that they are obsolete and cannot be used in competition long before they are worn out." (83 Cong. Rec. 6727-8 (1938)).

Petitioner attempts to avoid the thrust of Senator Truman's explanation on the ground that the rejected provision was a "specific mandate to prescribe" depreciation practices (p. 8, n. 8). Petitioner's argument apparently is that no conclusion can be drawn as to the attitude of Congress with respect to a provision that would merely have authorized, rather than required, regulation of depreciation practices. Congress, however, was thoroughly familiar with the technique of granting an agency discretion to prescribe depreciation practices rather than requiring such prescription.[8] It is significant, therefore, that, in response to Senator Truman's cogent arguments against depreciation determination by administrative fiat, it was not even suggested that there be enacted a grant of discretionary authority. Nor does it aid the Board's argument in the least to assume that Congress intended merely to withhold from it a "specific mandate to prescribe" depreciation practices since Section 407(d) upon which the Board relies for its power is just such a specific mandate—it provides that the Board "shall prescribe" and leaves no

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[8] The various statutes which authorize regulation of depreciation practices by different agencies use such phrases as "may prescribe" (Motor Carrier Act, 54 Stat. 927, 49 U.S.C. § 320(e)), "shall, as soon as practicable, prescribe" (Interstate Commerce Act (1920 Amendment), 41 Stat. 493, 49 U.S.C. § 20 (4); Water Carrier Act, 54 Stat. 945, 49 U.S.C. § 913(d); Federal Communications Act, 48 Stat. 1078, 47 U.S.C. § 220(b)), and "may, after hearing, require" (Federal Power Act, 49 Stat. 855, 16 U.S.C. § 825a(a); Natural Gas Act, 52 Stat. 826, 15 U.S.C. § 717h(a)).

room for discretion. Accordingly, the Board would have this Court hold that Congress inadvertently granted the same "specific mandate to prescribe" depreciation practices which the legislative history of the Act, by the Board's own admission, shows that Congress desired to withhold from the Board.

Finally, petitioner invokes the principle that an agency's "long-standing and consistent" administrative construction is not to be overturned except for cogent reasons.[9] (p. 11). To the extent this principle has application here, it requires the conclusion that the Board lacks the power it is now asserting for the first time in twenty years. The Comptroller General, after a "comprehensive audit of the Civil Aeronautics Board" reported to Congress in 1956 that the Board had not prescribed any overall depreciation *policies, rates of depreciation or residual value* on air carriers' flight equipment. On the contrary, the Report concluded that the determination "has been left to the discretion of the individual carrier management."[10] This Report, in which the Board concurred, persuaded the Court below that the Board had never exercised authority to prescribe depreciation practices. (App. p. 16)

Indeed, any suggestion that there has been a "long-standing and consistent" exercise of the power the Board here asserts is negatived by the fact that Congress has only recently been requested to grant the

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[9] The interpretation given a statute by those charged with its administration naturally gives rise to litigation, but it hardly is conclusive as to the meaning of the statute. *County of Marin* v. *United States*, 356 U.S. 412, 420; *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 280.

[10] *Comptroller General's Audit Report to the Congress of the United States, Civil Aeronautics Board, October 1955*, pp. 79, 8 (submitted April 9, 1956).

Board authority to exercise that very power. The Comptroller General on two different occasions has recommended to Congress that the Act be amended so as to permit the Board to prescribe depreciation practices. On April 28, 1955, the Comptroller General recommended that the Civil Aeronautics Act be amended so as to give the Board the specific authority to regulate depreciation policies that Congress had given other regulatory agencies.

> "[T]he Board has not prescribed any overall depreciation policies, rates of depreciation or residual values for air carriers' flight equipment . . . because it is of the view that authority to do so is not specifically contained in the Civil Aeronautics Act."[10]

A year later on April 9, 1956, the Comptroller General again recommended "that the Congress grant the Board specific statutory authority to establish depreciation rates . . . in keeping with similar powers presently vested in other regulatory bodies."[11] As the Court below found, the relevance of the Comptroller General's recommendations to this case is that Congress refused

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[11] Hearings of Subcommittee of the Senate Committee on Interstate and Foreign Commerce on Amendment to the Civil Aeronautics Act, 84th Cong., 1st Sess., pp. 179-180 (1955).

[12] *Comptroller General's Audit Report to the Congress of the United States, Civil Aeronautics Board, October 1955*, p. 80. The petition mistakenly refers to this later statement of the Comptroller General as being his "earlier" and "consistent" view (p. 10, n. 10). In making this second recommendation and after noting that the Civil Aeronautics Act "contains no such provision," the Comptroller General suggested the possibility that "sufficient implied powers" might be conferred by the Act. In looking for a provision of the Act from which to "imply" the power sought by the Board, the Comptroller General did not mention Section 407(d)

to amend the Civil Aeronautics Act so as to grant the requested power. Petitioner's implication that this refusal must mean that Congress had intended to grant the power is novel to say the least.

CONCLUSION

The question presented is of limited importance and the decision below is clearly correct. Accordingly, the petition should be denied.

Respectfully submitted.

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